

PROSECUTORIAL DISCRETION ON TRIAL

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I. INTRODUCTION

The number of criminal cases filed in state courts each year is staggering. Recent tabulations of criminal filings in state courts of several and limited jurisdiction for the year of 1981 indicated a range in the number of cases filed from 1,340 in Montana to 1,316,709 in Texas.¹ In addition, the estimated number of delinquency cases disposed of in the United States by courts of juvenile jurisdiction in 1980 was 1,345,200.²

The total number of criminal cases filed in United States district courts in 1982 was 31, 623.³ In that same year, 4,767 criminal appeals were filed in federal courts of appeal,⁴ and 907 petitions for certiorari to the Supreme Court were filed concerning criminal cases.⁵ In response to this flood of cases, pretrial diversion programs have been implemented in various communities.⁶

Pretrial diversion,⁷ also known as pretrial intervention, is a fairly new concept in the field of criminal law. Among the many objectives of pretrial diversion is the desire to alleviate congested court calendars.⁸ The "early diversion" concept was first attempted in the mid-1960's and has grown steadily since that date.⁹ The objec-

1. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1983 474 (1983) [hereinafter cited as SOURCEBOOK]. The number of criminal cases filed in each state in 1981 was: Alabama 140,170; Alaska 22,355; Arizona 148,395; Arkansas 147,428; California 923,834; Colorado 59,578; Connecticut 109,539; Delaware 56,822; District of Columbia 36,597; Florida 447,754; Georgia 45,286; Hawaii 52,537; Idaho 32,632; Illinois 712,379; Indiana 144,960; Iowa 113,667; Kansas 30,093; Kentucky 217,193; Louisiana 536,856; Maine 96,449; Maryland 171,781; Massachusetts 657,551; Michigan 538,014; Minnesota 114,986; Mississippi not available; Missouri 148,155; Montana 1,340; Nebraska 173,844; Nevada 52,822; New Hampshire 39,175; New Jersey 31,719; New Mexico 69,355; New York 1,209,061; North Carolina 487,783; North Dakota 21,719; Ohio 406,403; Oklahoma 267,540; Oregon 149,695; Pennsylvania 745,308; Rhode Island 38,940; South Carolina 469,894; South Dakota 136,471; Tennessee 37,213; Texas 1,316,709; Utah 37,366; Vermont 16,559; Virginia 399,209; Washington 170,557; West Virginia 117,493; Wisconsin 161,645; Wyoming 1,772. These are raw numbers that do not take into account variations in state reporting procedures.

2. *Id.*

3. *Id.* at 492.

4. *Id.* at 516.

5. *Id.* at 519.

6. This paper does not purport to provide an in-depth analysis of pretrial diversion, and will not attempt to make an exhaustive study of the various programs. For an in-depth study of various city and state programs, see NATIONAL PRETRIAL INTERVENTION SERVICE CENTER, PORTFOLIO OF DESCRIPTIVE PROFILES ON SELECTED PRETRIAL CRIMINAL JUSTICE INTERVENTION PROGRAMS 1-49 (April 1974).

7. See *infra* text accompanying notes 11-61.

8. NATIONAL PRETRIAL INTERVENTION SERVICE CENTER, PRETRIAL INTERVENTION STRATEGIES: AN EVALUATION OF POLICY-RELATED RESEARCH AND POLICYMAKER PERCEPTIONS 12 (Nov. 1974) [hereinafter cited as PRETRIAL INTERVENTION STRATEGIES].

9. Foreword to NATIONAL PRETRIAL INTERVENTION SERVICE CENTER, MONOGRAPH ON LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS (April 1974).

tive of this Note is to give the reader a basic understanding of the concept of pretrial diversion. From this starting point these programs and their desirability can be studied more closely in the future.

Specifically, this Note focuses on the use of pretrial diversion programs, and the statutes that create these programs, as a means to check what has typically been referred to as the unfettered discretion of the public prosecutor.¹⁰ It will be argued that many of the benefits expected from pretrial diversion programs have been lost as a result of the new class of litigation that has been spurred by expansive judicial interpretation of these programs. Diversion out of the normal criminal process is being used to create more litigation, which is precisely what the pretrial diversion programs sought to avoid by their implementation. Seeking to check the discretion of the prosecutor, defendants who have not been chosen by the prosecutor as good candidates for diversion are asserting a "right" to diversion within a given program or statute.

In order to determine if the benefits of diversion have effectively been negated by these practices, it is necessary to study the concept of diversion and some of its goals. With this background, a look at an actual diversion program will develop the practical aspects of the diversion concept. Next, the specific goals of pretrial diversion will be outlined, and the role of prosecutorial discretion in diversion programs will be examined. Finally, a look at the case law in this field will reveal the manner in which a concept to avoid litigation has been twisted and manipulated, coming full circle to a point where it actually spurs more litigation, thus negating much of its initial value.

II. PRETRIAL DIVERSION

A. Overview

In the broadest sense, diversion refers to any filtering of persons from the criminal justice system. Diversion in this context has been practiced for a long time in the United States.¹¹ Discretion on the part of the police in regard to decisions to arrest or dismiss, as well as the considerable discretion of the prosecutor or intake worker in regard to official or unofficial processing, constitute forms of diversion.¹² The term "diversion" has been extended to encom-

10. See Vorenburg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522-23 (1981).

11. CENTER FOR STUDIES OF CRIME AND DELINQUENCY, NATIONAL INSTITUTE OF MENTAL HEALTH, *DIVERSION FROM THE CRIMINAL JUSTICE SYSTEM* 1 (1971) [hereinafter cited as NATIONAL INSTITUTE].

12. *Id.* at 1-2.

pass a wide range of activities including 1) the repeal of certain criminal statutes; 2) youth service bureaus; 3) bail review projects emphasizing release on recognizance; 4) projects to assist judges in sentencing convicted offenders; 5) programs resulting in dismissal of criminal charges if the defendant complies with specified obligations; 6) and traditional criminal justice activities such as plea bargaining, screening, and the imposition of probation rather than incarceration.¹³

The term "diversion" has been used loosely, depending on the context of the situation in which it is used. This has resulted in considerable ambiguity and confusion. At a basic level diversion can be thought of as a non-criminal disposition of what would otherwise have been a criminal matter. Thus, diversion has been defined as

the practice by criminal justice officials - police, prosecutors, and judges - of channeling out of the criminal process classes of offenders who, as a consequence of their probable and assumed guilt, could theoretically be handled by the criminal process. . . Diversion usually (though not necessarily or always) means stopping short of conviction, sometimes short of prosecution or even formal arrest.¹⁴

As Raymond T. Nimmer has noted, diversion is defined somewhat differently in the *Report of the Corrections Task Force of the National Commission on Criminal Justice Standards and Goals*:

"Diversion" refers to formally acknowledged . . . efforts to utilize alternatives to . . . the justice system. To qualify as diversion such efforts must be undertaken prior to adjudication and after a legally proscribed action has occurred. . . . [D]iversion implies halting or suspending formal criminal or juvenile justice proceedings, against a person who has violated a statute, in favor of processing through a noncriminal disposition.¹⁵

Nimmer has suggested a good operational definition of diversion:

Diversion . . . is the disposition of a criminal complaint without a conviction, the noncriminal disposition being conditioned on either the performance of specified obligations by the defendant, or his participation in counseling or treatment. A diversion program is an enterprise that recurrently arranges conditional noncriminal dispositions whether or not they are in fact obtained for all defendants complying with the stated conditions.¹⁶

Although under a broad definition of diversion the process may take place after trial,¹⁷ this paper will be concerned with what has

13. See R. NIMMER, *DIVERSION THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION* 11-40 (1974).

14. Brakel, *Diversion From the Criminal Process: Informal Discretion, Motivation, and Formalization*, 48 DEN. L.J. 211, 213 (1971).

15. NATIONAL COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *CORRECTIONS TASK FORCE REPORT* 50 (1973), quoted in Nimmer, *supra* note 13, at 5.

16. Nimmer, *supra* note 13, at 5.

17. Nimmer, for example, refers to "diversion" as "the channeling of criminal defendants into programs that may not involve incarceration." *Id.* at 3.

been termed "pretrial diversion." Pretrial diversion has been defined as follows:

A formalized procedure authorized by legislation, court rule, or most commonly, by informal prosecutorial consent, whereby persons who are accused of certain criminal offenses and meet preestablished criteria have their prosecution suspended for a three month to one year period and are placed in a community-based rehabilitation program. The rehabilitation program may include counseling, training, and job placement. If conditions of the diversion referral are satisfied, the prosecution may be nolle prossed or the case dismissed; if not, the accused is returned for normal criminal processing.¹⁸

Pretrial diversion programs are based on the belief that it is not always wise to pursue formal courtroom prosecution for every criminal violation.¹⁹ As John A. Robertson has noted,

The subjects of diversion have fallen into two classes: (1) persons charged with offenses of dubious or controversial criminality, such as drug use, drunkenness and juvenile status offenses; and (2) persons for whom ordinary criminal processing may be dysfunctional, such as domestic assaulters, misdemeanants and juveniles. For both classes the purpose is to avoid costly criminal processing of questionable benefit to the individual and society, while maintaining social controls through services aimed at altering behavior.²⁰

Variations exist among pretrial diversion programs, but all share some similarities. For instance, at some point prior to trial or sentencing, "a predetermined class of arrestees is diverted into treatment or related services and further prosecution is stayed."²¹ Pretrial diversion programs also share similar goals. Two of the primary goals of pretrial diversion are the early identification and referral of defendants who are in need of treatment, and the quick and inexpensive disposition of cases which are more effectively handled without full criminal disposition.²²

Other goals of pretrial diversion—all interrelated—are also at work. One such goal is unburdening overloaded court dockets, thereby conserving scarce judicial resources. Another goal is reducing the incidence of offender recidivism by providing an alternative to incarceration. A third goal is "the training and placement of previously unemployed individuals."²³ Obtaining these goals benefits society as a whole, as well as the individual undergoing the particular pretrial diversion program.

18. Note, *Pretrial Diversion From the Criminal Process*, 83 YALE L.J. 827, 827 (1974).

19. Annot., 4 A.L.R. 4th 147, 151 (1981).

20. Robertson, *Pre-Trial Diversion of Drug Offenders: A Statutory Approach*, 52 B.U.L. REV. 335, 335 (1972).

21. *Id.* at 339.

22. Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 GEO. L.J. 667, 673 (1972).

23. Note, *supra* note 18.

All diversion programs must resolve similar issues. First, a class of candidates eligible for diversion must be determined. Next, a mechanism for screening those eligible must be implemented. After a class of divertees has been determined, a time when diversion will occur must be set. Other issues that must be resolved include the type of services performed by those diverted, the terms and conditions upon which diversion is granted and the consequences of successful completion of the program.²⁴

Many factors influence the decision to divert an individual from judicial proceedings, including "the nature of the offense, the circumstances of its commission, the attitude of the victim, and the character of the accused."²⁵ All programs have formal eligibility criteria concerning such matters as the residency of the accused, the age of the accused, and the charge brought against the accused.²⁶ Other common provisions of diversion programs include restrictions on prior arrests and the requirement of a guilty plea.²⁷ With this basic understanding of pretrial diversion programs, it will be helpful to focus on one particular program.

B. Sample Program - One Program in Ohio

Section 2935.36 of the Ohio Revised Code²⁸ provides for the establishment of pretrial diversion programs for certain offenders where the prosecuting attorney is so inclined.²⁹ The Ohio statute

24. Robertson, *supra* note 20, at 339.

25. NATIONAL INSTITUTE, *supra* note 11, at 1.

26. Note, *supra* note 18, at 832.

27. *Id.* at 832-33.

28. OHIO REV. CODE ANN. § 2935.36 (Page 1982).

29. Specifically § 2935.36 provides:

(A) The prosecuting attorney may establish pretrial diversion programs for adults who are accused of committing criminal offenses and whom he believes will probably not offend again. The programs shall be operated pursuant to written standards approved by journal entry by the presiding judge or, in courts with only one judge, the judge of the court of common pleas and shall not be applicable to any of the following:

(1) Repeat offenders or dangerous offenders, as defined in section 2929.01 of the Revised Code;

(2) Persons accused of an offense of violence or of a violation of section 2903.06, 2903.07, 2905.04, 2907.04, 2907.05, 2907.21, 2907.22, 2907.31, 2907.32, 2907.34, 2911.31, 2919.12, 2919.13, 2919.22, 2921.02, 2921.11, 2921.12, 2921.32, 2923.04, or 2923.20 of the Revised Code, with the exception that the prosecuting attorney may permit persons accused of such offenses to enter a pre-trial diversion program, if he finds any of the following:

(a) The accused did not cause, threaten, or intend serious physical harm to any person;

(b) The offense was the result of circumstances not likely to recur;

(c) The accused has no history of prior delinquency or criminal activity;

(d) The accused has led a law-abiding life for a substantial time before commission of the alleged offense;

(e) Substantial grounds tending to excuse or justify the alleged offense;

is similar to other pretrial diversion statutes³⁰ in many respects. The prosecuting attorney is given considerable discretion in establishing programs and in deciding who is eligible for these programs. With minor exceptions, the programs are not available to dangerous or repeat offenders. The accused must knowingly waive his right to a speedy trial for the period of the diversion. At a minimum, the victim of the crime must be informed of the intent of the prosecutor to permit the accused to enter the program.³¹ Finally, the prosecuting attorney makes the final determination of whether the individual has successfully completed the program and the charges should be dismissed.

One program that has been set up under this statute is the Franklin County Prosecuting Attorney's Screening and Diversion Program, in Columbus, Ohio. A recognized objective of this program is to reduce the workload of the courts by channeling would-be criminal defendants who qualify into appropriate community-based rehabilitation and counseling programs.³² It is thought that

(3) Persons accused of a violation of Chapter 2925 or 3719 of the Revised Code;

(4) Drug dependent persons or persons in danger of becoming drug dependent persons, as defined in section 3719.011 [3719.01.1] of the Revised Code. However, this division does not affect the eligibility of such persons for treatment in lieu of conviction pursuant to section 2951.041 [2951.04.1] of the Revised Code.

(B) An accused who enters a diversion program shall:

(1) Waive, in writing and contingent upon his successful completion of the program, his right to a speedy trial, the preliminary hearing, the time period within which the grand jury may consider an indictment against him, and arraignment, unless the hearing, indictment, or arraignment has already occurred;

(2) Agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court, that are applicable to the offense with which he is charged and to the conditions of the diversion program established by the prosecuting attorney.

(C) The trial court, upon the application of the prosecuting attorney, shall order the release from confinement of any accused who has agreed to enter a pre-trial diversion program and shall discharge and release any existing bail and release any sureties on recognizance bond conditioned upon the accused's compliance with the terms of the diversion program, or if the prosecuting attorney shall notify every victim of the crime and the arresting officers of his intent to permit the accused to enter a pre-trial diversion program. The victim of the crime and the arresting officers shall have the opportunity to file written objections with the prosecuting attorney prior to the commencement of the pre-trial diversion program.

(D) If the accused satisfactorily completes the diversion program, the prosecuting attorney shall recommend to the trial court that the charges against the accused be dismissed, and the court shall, upon the recommendation of the prosecuting attorney, dismiss the charges. If the accused chooses not to enter the prosecuting attorney's diversion program, or if the accused violates the conditions of the agreement pursuant to which he has been released, he may be brought to trial upon the charges in the manner provided by law, and the waiver executed pursuant to division (B)(1) of this section shall be void on the date the accused is removed from the program for the violation.

OHIO REV. CODE ANN. § 2935.36 (Page 1982).

30. See also FLA. STAT. § 944.025 (1979).

31. The Florida statute provides that the victim must consent to the accused's entrance into the diversion program. FLA. STAT. § 944.025(2) (1985).

32. Michael Miller, Prosecuting Attorney, Franklin County Prosecuting Attorney's Screening and Diversion Program (unpublished manuscript).

“(A) reduction of effort expended in the prosecution of lesser felonies results in a concomitant increase in time and resources available for prosecution of the more serious felonies which threaten public safety or represent manifestations of activities conducted by organized crime.”³³

One specific purpose of pretrial diversion is rehabilitation. As a consequence there is an insistence upon a highly selective program in which only candidates that show potential for the rehabilitation are chosen. The benefits of the contemplated diversion must also be weighed against any possible harm to society resulting from the abandonment of criminal prosecution.

In the Franklin County program a body called the “Diversion Unit” initially screens all cases being processed through the Franklin County Municipal Court.³⁴ The system has been described in the following manner:

An analysis by the director of the unit as to the suitability [of the accused] is initially made on the basis of prior adult record and facts and circumstances surrounding the offender. In order to qualify for the program, the individual who is charged must be an adult, must be a resident of Franklin County or an adjacent county, must have no prior felony conviction or pattern of adult or juvenile criminal behavior, must voluntarily consent to the program and the conditions established by the unit, and must waive certain rights. Once an initial determination is made, further follow-up is conducted through attendance at the defendant’s preliminary hearing, where contact can be made, prior to the hearing, with representatives of the arresting agency, the victim of the crime, the defendant, and his attorney.³⁵

Potential candidates for pretrial diversion are referred by many sources, including “a Pre-Trial Release Program, the Public Defender Society, private counsel, and law enforcement agencies.”³⁶ A record check is then performed, and a conference is held with the law enforcement detective and counsel to determine the suitability of the individual for diversion.³⁷ The defendant also completes a comprehensive application form that contains information such as “present and past residences, history of arrests, education, history of employment, military record, economic data, religious preference, family background, and a description of the events which led to the charge by the police.”³⁸ Attorneys are welcome to attend conferences at all stages.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

Before final acceptance into the diversion program is granted, consent must be given by the police and victim.³⁹ At this time the defendant must waive any rights to a speedy trial and must enter into two agreements with the Diversion Unit. One agreement contains several rules governing the conduct of the defendant while in the pretrial diversion program, and the other provides guidelines that the defendant must meet to successfully complete the program.⁴⁰

A follow-up by the Diversion Unit ensures that the conditions of the agreement are being met. This is conducted by the individual reporting at specific times to the unit, and by announced and unannounced visits to the individual's home and workplace to check on the progress of the individual. Program duration ranges from six months to two years.⁴¹

III. GOALS OF PRETRIAL DIVERSION

A. *The Victim*

The victim's sentiment may represent the strongest argument against a pretrial diversion program. Although there has been no study ascertaining the opinions of victims concerning their feelings about the diversion of the would-be defendant in their particular case, a less than ecstatic response by the victim would not be surprising. However, the fact that many programs call for the consent of the victim before implementation,⁴² lends support to an argument that the victim should not feel harmed by the program. This is especially true when the statute requires that the defendant pay restitution to the victim. In effect, the victim is compensated for the injury caused by the defendant.

B. *The Defendant*

The provisions of a typical pretrial diversion program, providing for dismissal of the criminal charges brought against the defendant after successful completion of the diversion program, seek to limit the stigma of criminalization for offenders who have sought treatment.⁴³ The stigma of going through the criminal process can limit the future social and economic opportunities of the accused, or cause the accused to undertake a deviant role, leading to fur-

39. *Id.*

40. *Id.*

41. *Id.*

42. In this respect the Ohio statute is representative.

43. Robertson, *supra* note 20, at 362-63.

ther antisocial acts.⁴⁴ Pretrial diversion also allows the defendant to avoid "the legal fees as well as the time and publicity attached to a criminal trial."⁴⁵

The National Pretrial Intervention Service Center outlines eight objectives of pretrial intervention programs designed to benefit the alleged criminal offender:

1. Improve the economic position of the unemployed and under-employed through (i) increased steady employment, (ii) increased earnings, (iii) upgrading in skill level and/or job position, and (iv) greater job satisfaction.
2. Increase the accessibility of adequate employment through (i) increased academic and vocational skills, (ii) improved work habits, and (iii) job placement.
3. Maintain the employment of those tenuously employed.
4. Increase the capacity to handle family and personal problems through knowledge and use of appropriate community resources made accessible by the program.
5. Avoid the delinquent or criminal label and alleviate the negative social and economic consequences attached to it.
6. Decrease recidivism and other forms of antisocial behavior.
7. Learn to use leisure time productively.
8. For juveniles, increase their readiness to participate in the adult working world.⁴⁶

A rehabilitative focus can be seen in the above stated objectives. This focus on rehabilitation is at the very heart of all pretrial diversion programs.

C. The Criminal Justice System

The National Pretrial Intervention Service Center has also proffered a list of objectives of pretrial intervention programs that purportedly benefit the criminal justice system:

1. Increase the alternatives available to the court for differential case processing.
2. Alleviate congested court calendars and increase flexibility in case processing through reduction in the number of individuals processed initially as recidivists.
3. Decrease the use of institutional correctional facilities resulting in the increased capacities of such institutions to adequately serve incarcerated individuals.
4. Increase the quantity and quality of the information base used for decision-making in court.
5. Reduce the costs associated with case processing, prosecution, trial, incarceration, probation and parole through a reduction in the number of individuals processed initially or as repeaters.

44. NATIONAL INSTITUTE, *supra* note 11, at 1.

45. Note, *Guilty Until Proven Innocent: Pretrial Diversion and Retroactive Criminal Status - The Constitutionality of the 1982 Massachusetts Drunk Driving Law*, 19 NEW ENG. L. REV. 377, 379 (1984) (footnote omitted).

46. PRETRIAL INTERVENTION STRATEGIES, *supra* note 8, at 12.

6. Bring the concept of accountability for services into the criminal justice system.
7. Improve the public image of the criminal justice process through demonstrating a concern for rehabilitation.⁴⁷

D. *The Community*

Likewise, the National Pretrial Intervention Service Center has extended a list of benefits to the community arising out of pretrial diversion programs:

1. Reduce recidivism and future anti-social behavior of those accused of criminal offenses.
2. Increase economic productivity through increases in employment, skills, wages, and motivation.
3. Create new careers and provide para-professional training for indigenous community members and ex-offenders who become staff members.
4. Decrease the reliance of the accused and his family on costly supportive services.
5. Mobilize and coordinate the work of various community supportive services; uncover needed but unavailable services.
6. Develop a manpower market for individuals facing substantial barriers to employment.
7. Increase the participation of the economic community in social programs.⁴⁸

Buttressing these specific goals of pretrial diversion programs is a growing feeling that there has been a general tendency in this country to rely too heavily on the law and legal process for the solution of social problems.⁴⁹ Pretrial diversion is one step toward a solution to the problem of so-called "overcriminalization."

E. *The Prosecutor*

Little attention has been given to the role of the prosecutor in pretrial diversion schemes. The Ohio program is illustrative of the fact that it is common in pretrial diversion programs to give great discretion to the prosecutor. Often the prosecutor must bring the application concerning possible candidates for diversion to the court and has the final decision concerning who enters the program. The unfettered nature of prosecutorial discretion is certainly nothing new and literature on the subject is abundant.⁵⁰ Recently, alleged criminal offenders have sought to check this prosecutorial discretion by asserting a "right" to pretrial diversion under given programs and statutes in particular jurisdictions under given programs and statutes in particular jurisdictions. Before further analysis of this problem, however, a brief discussion of prosecutorial discretion is in order.

47. *Id.*

48. *Id.*

49. NATIONAL INSTITUTE, *supra* note 11, at 3.

50. *See infra* notes 51-61 and accompanying text.

IV. PROSECUTORIAL DISCRETION

A. *The Nature of Prosecutorial Discretion*

The dominant role of the public prosecutor in the American system of criminal justice has received great attention and cannot be doubted.⁵¹ The prosecutor decides what offense to charge, how many offenses to charge, whether the evidence will support a conviction, what statutes will be enforced and how vehemently they will be enforced, what restitution will be adequate to the victim, whether to plea bargain, what will be an acceptable result of plea bargaining, and numerous other questions. Abraham S. Goldstein describes the role of the public prosecutor in the following manner:

In short, the prosecutor establishes enforcement priorities and accommodates conflicting statutory, correctional, and constitutional objectives. At the same time, he individualizes justice, induces cooperation, and mitigates the severity of the criminal law. His instruments for achieving these remarkably diverse objectives are his exclusive authority to initiate a criminal charge, his power to dismiss or reduce charges, and his overwhelmingly dominant role in plea bargaining.⁵²

James Vorenburg argues that while important reforms in criminal justice have been made in recent years to limit the exercise of the prosecutor's discretionary power in general, prosecutorial powers in fact have been expanded.⁵³ Vorenburg notes that "[T]here is a broad and rather casual acceptance of the fact that prosecutors often exercise greater control over the administration of criminal justice than do other officials."⁵⁴ Vorenburg concludes that prosecutorial discretion is virtually unchecked and is inconsistent with fair and effective administration of justice. Vorenburg defines "discretion" as "the ability to make decisions about guilt and degree of punishment without the limits of rules or other constraints on freedom of action, including judicial review generally imposed on other public officials making decisions of comparable import."⁵⁵

Goldstein argues that the monopoly power given to the public prosecutor to criminally charge has accentuated the alienation typically felt by victims of crime.⁵⁶ Goldstein argues that the vic-

51. See generally A. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* (1981) (Goldstein provides a thorough discussion of the powers of the prosecutor.)

52. *Id.* at 3-4.

53. Vorenburg, *supra* note 10, *passim*.

54. *Id.* at 1522.

55. *Id.* at 1523-24 (footnote omitted).

56. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 *Miss. L.J.* 515, 518-20 (1982)

tim plays a secondary role, reporting crimes to public officials and leaving it to their discretion to prosecute the offenders. As Goldstein puts it, the victim is "in a sense represented by the district attorney, but if his interest in pressing the charge comes into conflict with the prosecutor's conception of the public interest, the latter will prevail."⁵⁷ Here again, the pervasive discretionary power of the prosecutor cannot be overstated.

B. *The Mechanics of Prosecutorial Discretion*

The hub of the prosecutor's discretionary power is the power to charge, plea bargain, and initiate investigations.⁵⁸ Overcrowded dockets create a scarcity of time and resources, and the prosecutorial power to charge or not to charge takes on a greater significance.

Almost total insulation from judicial review further strengthens the prosecutor's position. This insulation has its roots in the writ of *nolle prosequi*.⁵⁹ Moreover, Goldstein argues, that when courts were starting not to routinely endorse the prosecutor's motions to dismiss, "the separations of powers doctrine entered on the scene and introduced a new sense of constitutional constraint about judicial inquiry into the prosecutor's actions."⁶⁰

Though more of an explanation of the precise nature and manner of prosecutorial discretion and power could be undertaken,⁶¹ a general idea of the virtually unchecked discretion of the public prosecutor is sufficient for the purpose of this Note. Given this wide use of discretionary power, it is not surprising that there have been recent attempts to check this power by the implementation of various statutes and diversion programs authorized by those statutes. An unexpected result has been alleged offenders, who have been denied pretrial diversion as a result of a prosecutorial decision, asserting that they have a "right" to diversion. Thus, the very pretrial diversion programs and statutes setting up these programs, which were designed to reduce litigation by diverting cases out of the courts, have been the source of new litigation.

57. *Id.* at 519.

58. Vorenburg, *supra* note 10, at 1524.

59. Goldstein, *supra* note 51, at 12.

60. *Id.* at 24.

61. See Vorenburg, *supra* note 10, for a detailed discussion analyzing how prosecutorial discretion to charge is translated into power by the prosecutor which is virtually unchecked.

V. PROSECUTORIAL DISCRETION ON TRIAL

A. Recent Cases

Cases alleging that a failure to divert constitutes an abuse of prosecutorial discretion are few. As more and more diversion programs are instituted, however, it seems probable that there will be an increase in the number of individuals using these programs, and the statutes under which the programs are implemented, as a means of checking the discretion of the prosecutor. The anomolous result will be an increase in litigation resulting from statutes and programs that were designed to avoid litigation. Indeed, the anomaly has begun.⁶²

In *State v. Hammersley*,⁶³ the defendant was arrested for stealing four hubcaps valued at approximately \$300.00. The defendant petitioned the trial court for a writ of certiorari, alleging that the failure to divert under the pretrial diversion statute⁶⁴ constituted an abuse of prosecutorial discretion. The trial court denied the petition and on appeal to the Court of Criminal Appeals the decision was reversed. The Supreme Court of Tennessee held that the failure of the district attorney general to consider the defendant's personal eligibility for pretrial diversion was an improper application of local policy contrary to or different from that provided by state law.⁶⁵ The court went on to rule that before a reviewing court can find an abuse of prosecutorial discretion, the record must show an absense of any substantial evidence to support such a refusal.⁶⁶ Further, the action of the prosecutor is presumptively correct and should be set aside only on the basis of patent or gross abuse. The court cited *Pace v. State*⁶⁷ for the proposition that the discretion of the prosecutor is not unbridled and must be exercised to serve the interests of justice, and to that end, is subject to review by the trial court upon proper application by the defendant.⁶⁸

62. The bulk of litigation in this area has occurred in Tennessee and Florida. Although a smattering of cases can be found in other jurisdictions, a look at the case law in Tennessee and Florida, as well as Ohio, will suffice for purposes of this Note.

63. 650 S.W.2d 352 (Tenn. 1983).

64. TENN. CODE ANN. §§ 40-15-101 to 40-15-106 (1982). This statute specifically provides:

The defendant shall have a right to petition for a writ of certiorari to the trial court for an abuse of prosecutorial discretion. If the trial court finds that the prosecuting attorney has abused his discretion in failing to divert, the trial court may order the prosecuting attorney to place the defendant in a diversion status on such terms and conditions as the trial court may order.

TENN. CODE ANN. § 40-15-105(b)(3).

65. *State v. Hammersley*, 650 S.W.2d 352, 356 (Tenn. 1983).

66. *Id.*

67. 566 S.W.2d 861, 864 (Tenn. 1978); note that in this case the constitutionality of the Tennessee diversion statute was upheld.

68. *State v. Hammersley*, 650 S.W.2d 352, 353 (Tenn. 1983).

Earlier cases in Tennessee indicate that the state's supreme court was not breaking any new ground in *State v. Hammersley*. In one case,⁶⁹ the defendant was indicted for driving under the influence of an intoxicant. It was his first offense. He sought participation in a pretrial diversion program under the appropriate statute, but the prosecutor "refused to enter a memorandum of understanding on the grounds that the statute (was) unconstitutional, that there (were) no facilities for diversion in his circuit, that the diversion statute (was) inapplicable to the D.U.I. statute because the latter statute contain(ed) a recidivist provision, and finally, because he personally disagreed with the concept of pretrial diversion."⁷⁰ The court held that the diversion statute was constitutional,⁷¹ and stated that the district attorney may not decline to enter a memorandum of understanding for "lack of facilities."⁷² Furthermore, the district attorney's refusal to enter a memorandum of understanding because he personally disagreed with the concept of pretrial diversion constituted a clear abuse of discretion.⁷³ The court also held that the nature of the offense of driving under the influence of an intoxicant was not a sufficient basis for the denial of an opportunity to participate in the diversion program.⁷⁴ Finally, the court held that cases involving driving under the influence of an intoxicant are not exempted from the operation of the diversion statute merely because there is a recidivist provision applicable to subsequent D.U.I. convictions.⁷⁵

Similarly, in *State v. Poplar*,⁷⁶ the court held that the district attorney general abused his discretion when he refused to enter into a diversion agreement with a defendant indicted for only one offense to which he admitted his guilt. The defendant was twenty-three years of age and employed, was supporting his own family and assisting in the support of disabled parents, and was purchasing a home upon which he was making regular mortgage payments.⁷⁷ However, in the same case, the court held that the district attorney general acted within his discretionary power when

69. *Blackwell v. State*, 605 S.W.2d 832 (Tenn. Crim. App. 1980).

70. *Id.* at 833.

71. *Id.* (citing *Pace v. State*, 566 S.W.2d 861, 864 (Tenn. 1978)).

72. *Blackwell v. State*, 605 S.W.2d 832, 833 (Tenn. Crim. App. 1980) (citing *Dearborne v. State*, 575 S.W.2d 259, 262 (Tenn. 1978)).

73. *Blackwell v. State*, 605 S.W.2d 832, 833-34 (Tenn. Crim. App. 1980).

74. *Id.* at 834.

75. *Id.*

76. 612 S.W.2d 498 (Tenn. Crim. App. 1980).

77. *Id.* at 501.

he refused to enter into a diversion agreement with a defendant who had committed two felonies and had a social history no better than that of an average citizen.⁷⁸

In another case,⁷⁹ the defendant was charged with false pretense, conspiracy to commit false pretense, and defrauding the county highway department by presenting false weight tickets. The defendant had no prior criminal record and was a reputable person.⁸⁰ Nonetheless, the Tennessee Court of Criminal Appeals held that the district attorney did not abuse his discretion in denying pretrial diversion to the defendant. The court reasoned that the criminal activity was extensive, was not impulsive but required considerable effort and planning, and was a serious problem in the circuit that was in need of deterrence.⁸¹

In a recent case decided by the Tennessee Court of Criminal Appeals,⁸² the court upheld the trial court's decision that the district attorney general did not abuse his discretion in denying pretrial diversion to a defendant who had unlawfully concealed a stolen automobile and altered its serial number. Though this decision did not retreat from earlier decisions, the court did note that the nature and circumstances of a crime may, in themselves, justify denial of pretrial diversion.⁸³

In yet another recent case decided by the Tennessee Court of Criminal Appeals,⁸⁴ the court again upheld the discretion of the district attorney general in denying the defendant's application for pretrial diversion. In *State v. Lovvorn* the court held that it was not necessary for the district attorney to be informed of the defendant's social history or background when pretrial diversion was denied because of the circumstances of the offense.⁸⁵ The court cited *Holland* for the proposition that the fact that the crime "involved deception and deceit and was not a crime of impulse" is a valid reason for refusing diversion.⁸⁶ Finally, the court in *Lovvorn* interpreted *Hammersley* to mean that each local district attorney general's office is not required to formulate and maintain specific

78. *Id.*

79. *State v. Holland*, 661 S.W.2d 91, 92 (Tenn. Crim. App. 1983).

80. *Id.* at 92.

81. *Id.* at 93.

82. *State v. Sutton*, 668 S.W.2d 678 (Tenn. Crim. App. 1984).

83. *Id.* at 680. The court cited *State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983) as authority for this proposition.

84. *State v. Lovvorn*, 691 S.W.2d 574 (Tenn. Crim. App. 1985).

85. *Id.* at 575-76

86. *Id.* at 577 (citing *State v. Holland*, 661 S.W.2d 678 (Tenn. Crim. App. 1983)).

guidelines establishing "public policy considerations" upon which pretrial diversion will be granted. Indeed, the district attorney general cannot "create local policy contrary to or different from that fixed by the legislature for the entire state."⁸⁷

Lovvorn is significant because it interprets both the applicable pretrial diversion statute⁸⁸ and the *Hammersley* decision in a way that is favorable to the district attorney. The appellant-defendant had argued that it was an abuse of the district attorney's discretion to not conduct a pretrial investigation pursuant to Tenn. Code Ann. § 40-15-104(a), which provides in part as follows:

Upon stipulation of the parties, the trial court by order *may* direct any county or municipal, or authorized private agency, available for this purpose, or the state department of correction if no local agency is available to conduct an investigation of the defendant's background. (emphasis added).

The court interpreted this part of the statute to mean that it is within the court's discretion to order the investigation, and that it was not necessary that the district attorney be informed of the defendant's social history or background inasmuch as the denial of pretrial diversion was based on other factors.⁸⁹

The appellant-defendant's second argument was that the decision of the district attorney general to deny pretrial diversion was an abuse of discretion because it was based on the prosecutor's individual policy considerations and not on "established objective standards."⁹⁰ The court, citing *Hammersley*, held that the "objective standards" needed to guide district attorney generals should not be created by the district attorneys themselves, but should be fixed by the legislature for the entire state.⁹¹ At first glance, this holding might be construed to diminish the discretionary power of the district attorney because it seems to limit his power. However, a closer inspection reveals that this decision allows the district attorney to continue to exercise a wide range of discretionary power, without having to formulate any objective standards for these acts. Instead, the district attorney is free to point to the objective standards in *Hammersley* as the standard by which the acts of the district attorney will be judged.⁹² The problem is that these objective standards that the *Lovvorn* court claimed were articulated in *Hammersley* are not that clear, and they are no where elucidated in *Lovvorn*. The result is a weaken-

87. *State v. Lovvorn*, 691 S.W.2d 574, 578 (Tenn. Crim. App. 1985) (interpreting *State v. Hammersley*, 650 S.W.2d 352 (Tenn. 1983)).

88. TENN. CODE ANN. §§ 40-15-101 to -106 (1982).

89. *State v. Lovvorn*, 691 S.W.2d 574, 576 (Tenn. Crim. App. 1985).

90. *Id.* at 578.

91. *Id.*

92. *Id.*

ing of the *Hammersley* decision, and a concomitant increase in the discretionary power enjoyed by the district attorney.

Louvorn is a step in the right direction insofar as it upholds the discretionary power of the district attorney, thereby preserving some of the effectiveness of the Tennessee Pretrial Diversion statute. However, it falls short of the action needed to give the statute the teeth necessary to carry out effective pretrial diversion programs.

In Ohio, there is at least one case in which the prosecutor appealed from a *sua sponte* ruling of a Municipal Court referring the defendant to a pretrial diversion program.⁹³ *City of Cleveland v. Mosquito* differs from each of the cases discussed above because the prosecutor's power was not under review. Instead, the prosecutor was attempting to regain discretionary powers seemingly lost in a lower court. The court held that timely objection by the prosecutor to a referral of the defendant to a pretrial diversion program was with good cause and should have been allowed by the trial court.⁹⁴ This would have denied the defendant an opportunity to enter the program and escape trial. The prosecutor, nevertheless, lost the larger battle because the court ruled that although section 2935.36 of the Ohio Revised Code "discloses a legislative intent to vest the prosecuting attorney with discretion regarding eligibility for pretrial intervention programs, it does not outlaw other established diversionary programs [which give such discretion to the judiciary]."⁹⁵ Consequently, although the prosecutor's decision not to divert the defendant was followed in this particular case, the court opened the door for diversion programs in which the discretionary power is lodged in the judiciary.

It has also been held in Ohio that a successfully completed diversion contract under section 2935.36 is the equivalent of served or probated time for offenses.⁹⁶ This provides the defendant who is denied diversion with a further incentive to bring suit against the prosecutor.

The Florida Supreme Court has held that a state attorney's

93. *City of Cleveland v. Mosquito*, 10 Ohio App. 3d 239, 461 N.E.2d 924 (1983).

94. *Id.* at 241, 461 N.E.2d at 927.

95. *Id.*

96. *State v. Urvan*, 4 Ohio App. 3d 151, 151, 446 N.E.2d 1161, 1162 (1982), *limited in Bean v. Bean*, 14 Ohio App. 3d 358, 471 N.E.2d 785 (1983). In *Urvan*, the defendant was charged with receiving stolen property. The formal charge was dropped when the defendant was placed in a pretrial diversion program for first offenders. After successfully completing the diversion program, the defendant was charged with grand theft in a different county. The charged offense was related to the same events as the prior charge of receiving stolen goods, and on appeal, the defendant's motion to dismiss the grand theft indictment on the ground of double jeopardy was upheld.

refusal to consent to an accused's admission into a pretrial intervention program is prosecutorial in nature and is not subject to judicial review.⁹⁷ The court reasoned that "the pretrial intervention program is merely an alternative to prosecution and should remain in the prosecutor's discretion."⁹⁸ This decision expressly overruled a prior Florida appellate decision⁹⁹ in which the court held that the prosecutor's consent was not necessary to place a defendant into a pretrial intervention program.

Similarly, the Florida Court of Appeals has held in *State v. C.C.B.*¹⁰⁰ that deferred prosecution in a juvenile case is similar to the pretrial intervention program established by section 944.025 of the Florida statutes.¹⁰¹ The state brought a delinquency petition against a juvenile, and the trial court dismissed the petition because "it would not be in the best interest of the child for the case to be prosecuted."¹⁰² The state appealed. The District Court of Appeals held that the determination of whether or not to prosecute is a discretionary function of the state attorney and not of the court, and therefore reversed.¹⁰³ This indicates that prosecutors in Florida have successfully fought off the attack on their discretion and have regained much of their authority in the area of diversion discretion.

The concern of this Note, however, is not with prosecutorial discretion of the public prosecutor. Few would argue that the prosecutor's power has been effectively curtailed.¹⁰⁴ Rather, the focus is how the very programs and statutes designed to discourage litigation have, in fact, spurred further litigation, regardless of the outcome of that litigation.

B. *Avoiding Increased Litigation*

The natural tendency in the system is toward litigation. The statistics alone seem to indicate that ours is one of the most litigious societies ever.¹⁰⁵ When there is a law there will almost inevitably be litigation relating to that law. While this is true, a law's existence is justifiable if it benefits society despite any increased litigation

97. *Cleveland v. State*, 417 So. 2d 653 (Fla. 1982).

98. *Id.* at 654.

99. *Id.*, overruling *State v. Eash*, 367 So. 2d 661 (Fla. Dist. Ct. App. 1979).

100. 465 So. 2d 1379, 1381 (Fla. Dist. Ct. App. 1985).

101. FLA. STAT. § 944.025 (1979).

102. *State v. C.C.B.*, 465 So. 2d 1379, 1380 (Fla. Dist. Ct. App. 1985).

103. *Id.* at 1380.

104. Goldstein, *supra* note 51.

105. SOURCEBOOK, *supra* note 1, at 474.

resulting from its implementation. However, when the benefits and goals of a particular law become so undermined that the law is actually producing more harm than good, then one of two actions must be taken. Either the law must be abandoned, or it must be modified (expressly or by judicial interpretation) to give it the teeth necessary to perform its intended function.

The goals and benefits of pretrial diversion programs have been pointed out by this paper in detail.¹⁰⁶ Assuming the desirability of these objectives, not the least of which includes the alleviation of congested court calendars, the question becomes: Does pretrial diversion have the ability to perform its intended functions? This question can be answered affirmatively only if each prosecutor is granted sufficient authority, by the legislatures and the courts, to effectively implement the programs. Making the prosecutor justify every decision of ineligibility for pretrial diversion programs will be detrimental in the long run. The result will be procedural inefficiency, harm to the victim, and chilling side effects on the discretion of the prosecutor. The prosecutor should be required to present justification for his actions in only the most egregious cases. Challenges to selective prosecution based on invidious discrimination, for example, should be preserved. Such challenges, of course, are preserved as a matter of constitutional law regardless of the nature of prosecutorial discretion.

Procedural inefficiency stems from lengthy pretrial motion hearings on diversion discretion that take as much, if not more, time than the average case takes to be resolved. The most common disposition of a felony arrest not rejected or dismissed is a plea of guilty.¹⁰⁷ Bureau of Justice statistical data obtained from prosecutors in a number of urban jurisdictions shows that in 1979 forty-five of every hundred felony arrests ended in guilty pleas, while only five ended in trials. The remaining dispositions (fifty of every hundred) were rejections and dismissals.¹⁰⁸ Therefore, the vast majority of cases not rejected or dismissed are dealt with by a guilty plea and do not consume the time and resources needed for pretrial motion hearings. Pretrial motion hearings on diversion discretion function as a brake slowing down the normal disposition of cases.

106. See *supra* text accompanying notes 11-61.

107. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, THE PREVALENCE OF GUILTY PLEAS (Special Report) (Dec. 1984).

108. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, THE PROSECUTION OF FELONY ARREST 1979 (1983).

Making prosecutors constantly defend their decisions not to enter particular defendants into pretrial diversion programs has a chilling effect on the prosecutor because the prosecutor's authority is constantly under attack both in the eyes of the courts and the public. Political pressure on prosecutors now is abundant;¹⁰⁹ further statutory pressure is not needed.

The victims of crime are also harmed by requiring the prosecutor to defend every decision not to enter a particular defendant into pretrial diversion. Victims may be put on the stand at pretrial motion hearings and compelled to recite details of their unfortunate experience while the opposing attorney is afforded free discovery. This may jeopardize the victim's rights.¹¹⁰ Questions of due process may arise and spur further litigation. Victims themselves may seek to curtail the authority of the prosecutor to divert particular defendants. This may lead to further questions of standing on the part of the victims to pursue such action. The snowball effect of this course seems evident. As the prosecutorial discretion necessary to effectively run pretrial diversion programs is eroded by the courts, the essence of the programs is destroyed. A good idea designed to avoid litigation and save judicial resources will be used to produce more litigation and deplete additional resources.

Furthermore, the demise of prosecutorial discretion fundamental to our system of criminal justice will produce grave consequences. An example is illustrative.¹¹¹ Suppose an eighteen-year-old college freshman in Ohio decides to steal the license plates from an automobile after he is assured by his cronies that this is standard freshman initiation. Under Ohio law this offense is a felony of the fourth degree,¹¹² punishable by up to five years imprisonment and a fine of \$2,500.00.¹¹³ In such a case, depending upon the precise circumstances, it would be advantageous to keep intact the prosecutorial discretion for charging a particular crime, or diverting

109. Consider the different treatment given to defendants in the public eye. These defendants are often treated more or less severely than they would be ordinarily as a consequence of political pressure on the prosecutor. For example, the highly publicized *United States v. DeLorean* case was greatly affected by the media. The publicity attending the case resulted in the court's issuance of a closure order with regard to all documents in connection with the criminal proceeding. *United States v. DeLorean*, 561 F. Supp. 797 (C.D. Cal. 1983).

110. There are many issues regarding victim's rights that are beyond the scope of this Note. For an introduction into the rights of a victim see ABA SECTION OF CRIMINAL JUSTICE, *GUIDELINES FOR FAIR TREATMENT OF CRIME VICTIMS AND WITNESSES* (1983).

111. This example is actually a variation of a real case. Interview with Craig R. Mayton, Supervising Attorney, Clinical Programs, Ohio State University College of Law (February 4, 1985).

112. OHIO REV. CODE ANN. § 2913.71 (Page 1982).

113. OHIO REV. CODE ANN. § 2929.11 (Page 1982).

into a pretrial diversion program. Prosecutorial discretion gives the system flexibility that would not otherwise be present. Even if one retorts by noting that in this case the judge does not have to impose the maximum sentence, a felony on a person's record will impose serious consequences that will be felt for life. Further, the flexibility at the decision-to-prosecute level, rather than at the sentencing level, reduces the congested court dockets and preserves the finite judicial resources needed to eradicate more serious offenses.

Therefore, the path taken by the Supreme Court of Florida in the case of *Cleveland v. State*¹¹⁴ is commendable. The court held that the state attorney's decision to refuse to consent to the accused's admission to a pretrial intervention program was prosecutorial in nature and not subject to judicial review.¹¹⁵ The court further noted that Florida's program is statutorily created¹¹⁶ and does not expressly provide for judicial review.¹¹⁷ This decision by the Florida legislature to frame the statute providing for pretrial diversion¹¹⁸ in such a manner that judicial review is not expressly provided for is to be applauded. By phrasing the statute in this manner the legislature has taken the first step in preserving the authority of the prosecutor and the prosecutorial discretion mechanism. By its interpretation of this legislation, the Supreme Court of Florida has taken the second step necessary to preserve the discretion of the prosecutor.

IV. CONCLUSION

It is not the intent of this Note to canvass all jurisdictions searching for litigation based upon the assertion of a "right" to pretrial diversion and a prosecutor's discretionary abrogation of that right. Rather, the intention here is to point out some newly litigated issues. This new source of litigation is noteworthy because it is based on an attempt to avoid litigation.¹¹⁹ The use of pretrial diver-

114. 417 So. 2d 653 (Fla. 1982).

115. *Id.* at 654.

116. FLA. STAT. § 944.025 (1985).

117. *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982).

118. The Florida statute is entitled "Pretrial Intervention Programs." FLA. STAT. § 944.025 (1979).

119. It is important to realize that this Note was focused on only one way the concept of pretrial diversion is used to incite litigation: using the given program and statute to check the unfettered discretion of the prosecutor. There are other issues involving questions of constitutionality and standing that have also spurred litigation and promise to do so in the future. These issues are often intermingled in the cases concerning a specific diversion program and statute. *See generally* Sledge v. Superior Court, 520 P.2d 412, 113 Cal. Rptr. 28 (1974); *State v. Greenlee*, 228 Kan. 712, 620 P.2d 1132 (1980); *State v. Lamphere*, 159 N.J. Super. 562, 388 A.2d 998 (1978); *State ex. rel.*

sion statutes and programs to check the discretion of the prosecutor produces an anomaly that results in procedural inefficiency, harm to the victim, and chilling side effects on the discretion of the prosecutor.

Cases can be found concerning the diversion of various applicants in which the discretion of the prosecutor has been upheld, and decisions in which the discretion of the prosecutor have been overruled or curtailed.¹²⁰ The important point is not the outcome of individual cases but the fact that litigation in this area is occurring and will continue. To curtail the advent of this new class of litigation, prosecutors must be given a free reign in deciding which candidates are suitable for entrance into pretrial diversion programs. The Supreme Court of Florida in *Cleveland v. State*¹²¹ has led the way in allowing this discretion. Only in the most egregious case of a clear abuse of prosecutorial discretion should the prosecutor be required to defend the decision not to allow a particular individual to enter a pretrial diversion program.

Harmon v. Blanding, 292 Or. 752, 644 P.2d 1082 (1982); Commonwealth v. Kindness, 371 A.2d 1346 (Pa. Super. Ct. 1977); State ex. rel. Schillberg v. Cascade Dist. Ct. 94 Wash. 2d 772, 621 P.2d 115 (1980).

120. See Annot., 4 A.L.R. 4th 147, 166-80 (1981).

121. 417 So. 2d. 653 (Fla. 1982).